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No. 86-1833 (2)

IN THE

Supreme Court Of The United States

October Term, 1986

BERMAN J. WATTS, JR.,
Petitioner,

vs.

GENERAL TELEPHONE COMPANY
OF THE SOUTHEAST,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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June 13, 1987

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QUESTION PRESENTED

I. WHETHER THE AFFIRMATION BY THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT OF THE FINDINGS OF FACT BY THE TRIAL COURT IS CLEARLY ERRONEOUS.

LIST OF PARENT COMPANIES, SUBSIDIARIES, AND AFFILIATES

The parent company of respondent General Telephone Company of the Southeast is GTE Corporation. Due to a name change respondent is now known as General Telephone Company of the South.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The respondent General Telephone Company of the Southeast respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Eleventh Circuit's opinion in this case.

OPINIONS BELOW

The Eleventh Circuit's opinion has not been reported. A copy of that opinion is set forth in the appendix hereto beginning at page A-1.

The memorandum opinion of the United States District Court for the Middle District of Alabama is not reported. A copy of that opinion is set forth in the appendix hereto beginning at page A-4.

STATEMENT OF THE CASE

Petitioner Berman J. Watts, Jr., (hereinafter "Watts") brought this action against Respondent General Telephone Company of the Southeast (hereinafter "GTE") under Title VII of the Civil Rights Act of 1964, as amended at 42 U.S.C. § 2000(e) et seq., seeking injunctive relief, reinstatment and back pay. The trial court's jurisdiction was predicated upon 28 U.S.C. §§ 1344(3) and (4).

This action arises out of GTE's formal appraisals of Watts' work performance on April 28, 1981 and on November 30, 1981, and GTE's subsequent discharge of Watts on December 2, 1981. Watts alleges that GTE's acts were both racially motivated and done in retaliation for Watts having filed racial discrimination charges against GTE with the Equal Employment Opportunity Commission (hereinafter "EEOC"). GTE denies Watts' allegations and asserts that Watts was discharged for unsatisfactory performance. A non-jury trial was held on December 2, 1985. On January 9, 1986, the trial judge entered judgment denying the relief sought by Watts. Watts appealed to the United States Court of Appeals for the Eleventh Circuit which affirmed the decision of the District Court on December 16, 1986. Watts' Petition for Rehearing and Suggestion for a Rehearing En Banc was denied on January 29, 1987. Subsequently, Watts filed the instant

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

REASONS WHY THE PETITION SHOULD BE DENIED

Insofar as applicable to the instant Petition, Supreme Court Rule 17 provides that a review on Writ of Certiorari may be granted:

> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals in the same manner . . . or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

The instant Petition does not fit within the parameters of this standard.

I. The Decision of the Eleventh Circuit Does Not Conflict With That of Other Federal Courts of Appeals.

The Eleventh Circuit, in affirming the decision of the trial court, held: "The determination of discrimination in a Title VII case is an ultimate fact issue and is reviewed by an appellate court under the 'clearly erroneous' standard." Appendix at p. A-2. All of the federal courts of appeals concur with this standard.[1]

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[1] *See e.g. Marcoux v. State*, 797 F.2d 1100, 1106 (1st Cir. 1986); *Davis v. State University of New York*, 802 F.2d 638, 642 (2nd Cir. 1986); *Protos v. Volkswagen of America, Inc.*, 797 F.2d 129, 135 (3rd Cir.), *cert. denied*, ___ U.S. ___, 107 S.Ct. 474, 93 L.Ed.2d 418 (1986); *Warren v. Halstead Industries, Inc.*, 802 F.2d 746, 751 (4th Cir. 1986); *Falcon v. General Telephone Company*, 815 F.2d 317, 321 (5th Cir. 1987); *Tye v. Board of Education*, 811 F.2d 315, 317 (6th Cir. 1987); *Ratliff v. City of Milwaukee*, 795 F.2d 612, 616 (7th Cir. 1986); *Johnson v. Legal Services of Arkansas, Inc.*, 813 F.2d 893, 896 (8th Cir. 1987); *Maxwell v. City of Tucson*, 803 F.2d 444, 448 (9th Cir. 1986); *Thompson v. Rockwell International Corp.*, 811 F.2d 1345, 1350 (10th Cir. 1987); *Bishopp v. District of Columbia*, 788 F.2d 781, 785 (D.C. Cir. 1986).

Indeed, this court has specifically recognized the propriety of this standard in a Title VII case. *Anderson v. City of Bessemer City,* 470 U.S. 564, 573-75 (1985); *Pullman Standard v. Swintn,* 456 U.S. 273, 287 (1982).

Thus, the only remaining issue to consider in determining whether the Petition for Writ of Certiorari should be granted is whether the decision of the Eleventh Circuit is such a departure from the "clearly erroneous" standard "as to call for an exercise of this Court's power of supervision."

II. The Eleventh Circuit's Decision Conforms to the "Clearly Erroneous" Standard.

The Eleventh Circuit's affirmation of the trial court's decision that GTE discharged Watts because he was not performing his job satisfactorily is not "clearly erroneous". Rather, as is discussed below, the decision is fully supported by the evidence.

Watts' employment was terminated by GTE on December 2, 1981. Watts filed the instant action contending that the termination resulted from GTE's discrimination against him because of his race (black) and in retaliation against him for filing a charge of discrimination against GTE with the EEOC in December, 1980. Watts contends GTE's discrimination against him was forwarded by arbitrary, unlawfully subjective, and otherwise discriminatory evaluations of him during the course of his employment to which white employees similarly situated were not subjected.

GTE, to the contrary, submits that Watts was not terminated because he is black, but because of his inability to satisfactorily perform his duties as a COE supervisor. This unsatisfactory performance arose out of his marginal technical competence and his inability to supervise. The latter problem was caused by his scant ability to communicate orally and his defensive,

abrasive personality. The evidence substantiating these contentions and the propriety of the trial court's decision and the Eleventh Circuit's affirmation will now be discussed.

A. *Watts' Background Prior to GTE*

A review of Watt's history reveals that he is not very capable and that he consistently has trouble with his employment. For instance, upon graduation from college, he was hired as a "loss prevention engineer" by Factory Mutual Engineering. In this job he was to minimize the loss of an insured by providing inspections and consulting services (Trial Transcript ["Tr."] 21-22). Watts was with Factory Mutual from 1973 until 1978 at which time was fired because of "a failure to perform satisfactorily on a continuing basis" (Tr. at 22-23).

B. *Employment at GTE*

On June 18, 1979, Watts filed an application for employment with GTE (Plaintiff's Exhibit ["Px"] 2). One of the affirmations on the application, which Watts admitted he read (Tr. 96), provides: "I understand that any false statements or omissions of information on this application will be sufficient cause for discharge if employed." While Watts indicated on the application that he had been employed by Factory Mutual Engineering, he left blank the area labeled "Reason for Leaving", thereby not stating that he had been fired by Factory Mutual.

To compound this lack of candor, Watts submitted an "Amplified Resume" to GTE which included a section entitled "Employment Highlights" (Defendant's Exhibit ["Dx"] 4). Rather than admit truthfully that he had been fired by Factory Mutual Engineering, Watts fabricated the following as the reason for leaving his

employment with Factory Mutual: "I desire to specialize in direct use of electro-mechanical applications and also gain experience with getting engineering solutions by computer. On a long term basis I believe that such skills will become increasingly useful" (Dx 4). It is respectfully submitted that this premeditated lack of candor should be considered by the Court when considering the validity, *vel non,* of Watts' testimony.

Based certainly in part on the material submitted to GTE, Watts was hired as a COE supervisor trainee. Watts was informed that a COE supervisor job was designed for those who could troubleshoot and that the position required the supervision of a number of technical specialists (Tr. 101-02). He then attended a twenty week training school to equip him to perform as a COE supervisor (Tr. 29). There was testimony that the training may not be the optimum to prepare persons to be a COE supervisor. However, Watts admits that he was given the same training in the school as whites (Tr. 106).

1. *Transfer to Alabama*

Leroy Davis, Switching Services Manager of GTE's Alabama Division, testified that he had not had good luck with students from the COE supervisor course. Prior to Watts, Davis had been assigned three white graduates. All three whites proved to be technically unsatisfactory and are no longer with the company (Tr. 364). Thereafter, Davis was sent two graduates in December, 1979. One was Watts. The other was a white, Ralph Cook. Davis did not have COE supervisor slots available for either man (Tr. 365). Cook, because of his military experience in electronics, was placed as an extra in electronic switching (Tr. 108). GTE was not pleased with Cook's performance. He was transferred out of switching

maintenance and, during a reorganization, was terminated (Tr. 367).

2. *Assignment to the TAC Unit*

Watts, because of his lack of experience in telephony, was assigned to the Trouble Analysis Center ("TAC") (Tr. 368). One of the primary duties of TAC personnel is to aid COE supervisors in troubleshooting their equipment (Tr. 33, 108). Watts was given assignments which familiarized him with telephone equipment (Tr. 369). Even Watts admitted that he used his experience in TAC when he later became a COE supervisor (Tr. 114).

While with the TAC unit, Watts' immediate supervisor was Jack Outlaw ("Outlaw") and Outlaw's supervisor was Orby Parker ("Parker") (Tr. 368). In March, 1980 Watts was given his first written goals (Dx 9). On June 17, 1980, Watts was formally evaluated in writing (Dx 14). Unfortunately, while assigned to the TAC unit, Watts demonstrated a lack of the technical and interpersonal skills necessary to function as a first line supervisor (Dx 16). A problem of primary concern was Watts' inability to communicate effectively and to get along with others. Parker and Outlaw testified that complaints regarding Watts from inside and outside GTE were constant and recurring (Tr. 398, 411-12).

Because of the deficiencies noted above, his supervisors concluded that Watts did not have the necessary abilities to be a TAC Analyst or a COE Supervisor and recommended that he be transferred to another position within GTE and, if no other position was available, that termination should be considered (Dx 14). His supervisors decided to put Watts on probation, to give him thirty-day goals, and, if these goals were completed satisfactorily, to transfer him to another position (Tr. 413-14).

On August 1, 1980, these conclusions were discussed with Watts (Dx 16). Did he respond positively to the critique, realize that his performance was not up to par, and attempt to change his method of dealing with co-employees? No. Instead, Watts demanded that all grades on the written evaluation be changed "to reflect an overall status of excellent" (Dx 20). He further filed an "analysis" of the appraisal in which he asserted his supervisors lied (Dx 15). For example, the analysis asserts an "omission of relevant facts and undocumentable statements (where the contrary is documentable) to *falsely imply* that accomplishments on goals and general performance are unsatisfactory" (emphasis added) (*See also,* Dx 20) Watts had declared "war" on GTE. From this point forward, the record reflects no attempt by Watts to succeed, but rather indicates constant attempts to pad a record for a lawsuit.

Such assaults are indicative of two of Watts' traits. First, it demonstrates his abrasive, caustic, defensive approach to others. If Watts spoke in this manner to his superiors, one can only surmize that subordinates were subjected to worse. Second, his immediate response to constructive criticism is that it is unjustly and racially motivated.

Rather than being bigots, the uncontroverted testimony is that Watts is the only black Davis or Parker recommended for possible termination (Tr. 373, 401). In fact, Parker has recommended six blacks for promotion (Tr. 401-02). Davis has recommended at least as many blacks for promotion (Tr. 373-75).[2] Thus, far from being racial bigots, the evidence reveals that Watts' TAC supervisors have not discriminated against blacks. This finding supports their opinion that Watts'

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[2]Significantly, in 1983, a reorganization caused the loss of six COE Supervisor slots. Two of the slots were then filled by blacks. Both blacks are still with the company. Two white COE Supervisors were terminated (Tr. 376).

performance was simply unsatisfactory. Asked if Watts would have been treated differently if he had been white, Parker opined that in such a case the recommendation would have come sooner (Tr. 403).

3. *Watts as a COE Supervisor*

Watts successfully accomplished his thirty-day goals and on September 8, 1980, was offered a position as a COE supervisor in the local toll center or a position in building maintenance. He chose the former (Tr. 137).

Even Watts admits that to properly perform his duties a COE supervisor must: (1) have a good working knowledge of his equipment, and (2) be able to communicate well orally and to work well with those under his supervision (Tr. 105). Without a mastery of both, a COE supervisor simply cannot fulfill his duties.

As an apology for his poor technical performance as a COE supervisor, Watts asserted that he was not properly trained to supervise a central office equipment toll center. The evidence, however, established that the three primary pieces of equipment in a class four toll center are the 91A PCM carrier, the SATT, and the 104 Director (Tr. 450). Prior to being assigned to the toll center, Watts attended a school on the 91A PCM carrier (Tr. 126). As soon as he was assigned to the toll center, Wayne Brackin (hereinafter "Brackin"), his supervisor, sent him to multiple-week schools on the SATT and the 104 Director (Tr. 139-40). Thereafter, Watts received on-the-job training from the other COE operators as well as from Brackin (Tr. 140, 217). These are hardly the actions of a company or individuals devoted to discriminating against Watts. Moreover, there is no evidence that Watts received less training than whites who graduated from the COE

supervisor school prior to being assigned to function as a COE supervisor.

After completing his SATT and 104 Director schools, and the on-the-job training, Watts was assigned a shift and given written goals (Px 7). These goals included developmental goals, which required that Watts develop a working knowledge of the equipment for which he was responsible by February 27, 1981. This knowledge is imperative for a COE supervisor (Tr. 105).

The uncontroverted evidence is that it is common for a person to be given goals to help overcome his individual weaknesses (Tr. 420). The only testimony offered to rebut the contention that Watts was weak technically came from Watts. Every other witness who had personal knowledge of Watts testified to his lack of technical proficiency (Tr. 397, 398, 411, 440).

Watts contends that no white supervisors were given such goals. He is correct. Indeed, no other black supervisors were given such goals. Why? Because the other COE supervisors, both black and white, were technically adept (Tr. 453).

From the start, Watts had problems with the technical aspect of his job and with communicating orally. Each time problems were noted, Brackin counseled Watts on ways to perform his job better and to get along with his peers and subordinates (Tr. 461).

Six months after being assigned to Brackin, Watts was given a formal "management appraisal summary" ("MAS") on April 28, 1981 (Px 8). Therein, Brackin noted that Watts was "knowledgeable in written communications". However, under "Skills Which Need Improvement", Brackin noted:

> Oral communication and interpersonal skills need much improvement. Counseling sessions have been held with Mr. Watts in an attempt to improve

> on these. However, in dealing with myself, his peers and craftsmen, Mr. Watts is highly defensive.[3]

Under "Actions to be Taken by the Employee" Brackin further noted:

> Additional on-the-job managerial training is needed in the area of responsibility. More emphasis needs to be placed in acquiring skills in SATT, Carrier, and 102 where he has had formal training. Much improvement is needed in oral communication with his supervisor, peers, and in oral communication with subordinates.

Px 8.

The goals assigned to Watts were divided into two categories. The first category involved failure rates for equipment in the toll center. These were shared goals, the success of which was contributed to by the entire department. These goals were noted to be satisfactory.

Under the developmental goals, the second category, Watts was graded on his working knowledge of the listed items. A number were fully satisfactory, some were merely acceptable, some were provisional, and others were unsatisfactory.

On attachment 3 of the MAS, there is a list of six specific instances of problems caused by Watts' lack of technical expertise and his failure to communicate openly with the work group. In summary Brackin opined:

> Although technical proficiency is marginally acceptable, he continues to demonstrate poor judgment and at this time, lacks the ability to communicate effectively with superiors, peers, and subordinates. For these reasons his overall per-

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[3]This conclusion is supported by the testimony of other witnesses. *See, e.g.,* (Tr. 429, 441).

> formance is best rated as being provisional. However, improvement in these areas has been noted since Mr. Watts began his assignment as a Service Supervisor COE and with continued emphasis and initiative on his part, I expect his performance to progress to an acceptable level. He will again be formally appraised by November 19, 1981.

Px 8.

Once again, rather than attempting to improve his interpersonal relations and technical expertise, Watts spewed forth a stream of venom which amply demonstrates his lack of objectivity and his defensive, abrasive, and prejudiced nature as well as his preference for padding a file rather than improving his performance. One paragraph of his "Analysis of Management and Performance Appraisal for B. J. Watts of April 28, 1981" (Dx 32), submitted to GTE, typifies his attitude towards superiors and subordinates:

> The appraiser is so eager to denegrate that he makes contradictory statements and is inconsistent in the appraisal. Such avidity implies an interest beyond discriminatory intent and action. His rabid defensiveness and prejudiced actions indicate a darker motivation that drove him to commit such obvious and demonstrable breaches of business, moral and legal ethics. Unless such activities are his normal behavior, we are forced to conclude that he felt that some obligation to what his mind sees as a higher cause came before his moral duty to his employer, society, religion, and honor.

Dx 32.

This was followed several paragraphs later by the following contention:

> Mr. Brackin's rabid defensiveness that overrides all morality and consciousness springs from a de-

> sire to protect the cooperative system that allows him as a less qualified white to be in a position that no black (however well qualified) could hope for (via local promotions) even today. But his actions go beyond this, by denying black advancement he avoids facing a symbolic rejection of an unstated assumption that he and his brethren profit thereby. To promote a black in competition with whites, no matter how well the black may outclass the white, is to challenge the subjective rationalization of white superiority that is a cornerstone of certain whites, especially those who know themselves to be inferior but cannot face it (self-esteem).
>
> By falsely reporting the performance of the less qualified as good, Brackin and others maintain a system based on color and lack of threat potential.

Dx 32.

The "analysis" is filled with such hate-spiced language. To say that Watts was at this time attempting to be a good employee and get along with others is ludicrous. His "war" was now in full swing. These declarations are also evident in his memoranda to Brackin dated May 15, 1981 (Dx 33) and June 18, 1981 (Dx 37).

Following the MAS, Brackin revised the goals for Watts on May 19, 1981 (Px 11). Watts refused to have any input into or to sign the same. *Id.* The revised objectives, to be completed from May 19, 1981 through November 19, 1981, set forth both shared and individual developmental goals. The "working knowledge" developmental goals were modified. Those pieces of equipment and procedures upon which Watts had tested "fully satisfactory" were deleted from the revised list of development goals (Tr. 71).

Two new goals were given to Watts at that time. They were:

> 7. Improve oral communications with craft employees to the point where oral and written grievances do not exceed those of other Supervisors in the same work group.
>
> 8. Develop harmonious rapport with associated departments. The measurement of this objective will be from reports of positive or negative responses to myself or superiors.

Px 11.

Watts complains bittery that such major goals were never given to white supervisors. Correct. Moreover, such major goals were never given to other black supervisors. Why then was Watts given such goals? As Brackin stated: "That is where the problem was" (Tr. 472).

Other supervisors did not have the severe problem of communicating with and of getting along with both craft employees and with persons in other departments (Tr. 472).[4] Other than Watts' testimony, the evidence was consistent that Watts had a severe problem communicating and existing harmoniously with co-employees (Tr. 398, 411, 418, 419, 440, 441, 461, 478). Every witness, including Watts, testified that oral communications and the ability to work harmoniously with others are of paramount importance to a COE supervisor.

Interestingly, Watts originally complained that his first goals were too subjective and that there was no objective standard by which to measure his performance on the developmental goals. Now in the revised goals seven and eight, objective standards were set

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[4]Other COE supervisors were given minor goals of improving oral communications (Tr. 274-75, 278-79). However, there is no evidence that the weaknesses noted in these men approached the magnitude or severity of Watts' problem with communication. Moreover, the two black supervisors, Durr and Brown, were never given such minor goals (Tr. 427-28, Dx 64).

forth in an attempt to remove subjectivity. That is, his ability to communicate orally would be measured by comparing the number of grievances filed against him with those filed against other similarly situated supervisors. Likewise, the ability to work harmoniously with other departments would be measured by written and oral complaints received from such departments. It now seems that when "objective" standards were promulgated, Watts suddenly sensed a "conspiracy" between Brackin and the union to denegrate his performance (Tr. 151).

From June 1, 1981 until the time of the final MAS, dated November 30, 1981 (Px 15), Watts' technical problems and his poor relations with co-employees continued unabated. As such instances arose, Brackin consistently counseled him regarding the same. (Tr. 469).

The final MAS of November 30, 1981 resulted in an overall performance rating of unsatisfactory. The shared goals were all fully satisfactory or above. The "working knowledge" developmental goals were all above unsatisfactory with one exception. Unfortunately, the "improve oral communication" goal was rated unsatisfactory for the following reasons:

> For this rating period, Mr. Watts has had four grievances which have gone to second step and two additional grievances which are pending in the first step. For the same time frame, only one grievance has been filed against the other two Supervisors in this work group. He has exhibited an inability to effectively communicate orally with craft employees. The nature of the oral and written grievances filed against Mr. Watts indicates that he does not clearly convey directives to subor-

dinates; and they resent his abrupt and impersonal approach.

Px 15.[5]

As the evidence indicated, all COE supervisors from time-to-time supervised the same craft personnel. Watts contends that the union grievances were filed because he was black. Strangely enough, however, Willie Durr, another black COE supervisor, did not receive one grievance during the entire time that Watts was with the COE group (Tr. 356). For the period September, 1980 through November, 1981, Watts had eight grievances filed against him. Six were sustained in favor of the union and two were settled (Tr. 356). Only eleven grievances were filed against *all* other COE supervisors combined. Seven of these were denied, two were sustained, and two were settled (Tr. 356). Thus, not only were more grievances brought against Watts, but also more were sustained.

Moreover, W. A. Brown, another black COE Supervisor, was commended on one of his appraisals for improving relations with craft employees (Dx 64). Brackin performed the appraisal of Brown. This appraisal pointed to the decline in union grievances since Brown took over as COE supervisor as evidence of Brown's ability to communicate effectively with his subordinates. If the union and Brackin were conspiring to discriminate against blacks, they had a strange way of exhibiting their bigotry, as complaints under Brown declined once he became a supervisor, and as Durr had no grievances filed against him during the time that Watts was employed as a COE supervisor.

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[5]Moreover, Watts did not "develop harmonious rapport with associated departments" as was indicated by written and oral complaints submitted to Brackin (Px 15).

Instances of Mr. Watts' inability to communicate and his poor judgment are set forth in the November MAS. Brackin summarized his appraisal of Watts as follows:

> In conclusion, Mr. Watts' ability to apply technical knowledge has improved slightly, but not in accordance with the training he has been provided. Mr. Watts has put in long hours which has been noted by numerous individuals and he has performed some activities satisfactorily. However, my evaluation of Mr. Watts as unsatisfactory results from his lack of ability to communicate effectively with and direct the activities of his work group, his use of poor judgment, and total inability to get along with his fellow employees. I no longer believe that Mr. Watts can make significant improvements in his supervisory ability. In view of his continued unacceptable performance, Mr. Watts should be terminated.

Px 15.

As a result, on December 2, 1981, Watts was terminated by GTE (Px 17). This termination occurred more than two years after he was first employed. During that two year period Watts attended numerous schools which covered more than twenty-five weeks of classroom instruction. Additionally, Watts was given continual on-the-job training. Despite these advantages, and there is no indication in the record that whites were given any better training, Watts was simply unable to perform satisfactorily.

Throughout the course of his tenure at GTE, each of his supervisors commented on his lack of technical expertise and his inability to communicate with and work harmoniously with co-employees. Other blacks working for the same supervisors were not recom-

mended for termination, but were recommended for and received promotions.[6]

Watts contends that the evaluation was a lie and that the lie could be proved by "documentable evidence" and by producing witnesses who were not Brackin's "long time associates". Watts had the opportunity to interview or depose all employees of GTE and to have access to all records. Amazingly, Watts did not call one witness to support his claims that he was discriminated against. He did not call one witness to support his claim that he was technically competent or that he had a working knowledge of his equipment, or that he communicated well and got along with his co-employees. There is only Watts' bald testimony. The record is devoid of corroborating evidence.

Rather than face up to his inadequacies, Watts seized on discrimination as the source of all criticism. This resulted in a second charge being filed with the EEOC against GTE arising out of GTE's evaluations of Watts as a COE supervisor. At that time, Watts apparently believed that GTE, the supervisors at GTE, the union, and perhaps *even the EEOC* were involved in a conspiracy to discriminate against him.

Watts' inability to perceive reality and the depth of his paranoia is demonstrated in a letter from him to Eugene B. Keenan of the EEOC dated December 9, 1982.[7] In that letter Watts upbraids the EEOC for not properly investigating his claims against GTE. In summary, Watts alleges that the EEOC may be involved in the scheme of discrimination against him stating:

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[6]Moreover, the utilization of blacks in GTE's Alabama Division has met or exceeded affirmative action guidelines based on OFCCP regulations from 1979 to 1983 (Tr. 291-93).

[7]The letter is a part of Px 1 and is located between tabs 7 and 8 thereof.

> It is possible that those charged with enforcing such law are now engaged in using the letter of the law to deny its purpose. It is even possible that those charged with enforcing such law are so opposed to such law that they sabotage it rather than do their sworn duty. Such behavior and activity continues the effect of massive discrimination against blacks and also increases such discrimination and injustice by offering encouragement and reward to white bigotry.

Px 1.

This paranoia accompanied Watts to his present employment at Fort Rucker, Alabama, as an aerospace engineer. In one grading period his performance was evaluated as less than satisfactory. Rather than accept the criticism and attempt to improve, Watts astoundingly concluded that he was being discriminated against because of his race (Tr. 192-93).

In conclusion, the record establishes that Watts has held three major jobs during his working life. These were at Factory Mutual Engineering, GTE, and at Fort Rucker. In all three he has been cited at least once for unsatisfactory performance. He was discharged from two of those three jobs for inability to satisfactorily perform his duties. The only evidence indicating that Watts was fired because of his race comes from Watts. All other witnesses testified to Watts' inability technically and to his lack of human relation skills. The severity of these problems was addressed by every witness except Watts.

Other blacks under each of Watts' supervisors not only have not been fired, but have flourished. If Watts was treated differently from other supervisors, both black and white, it was not because of his race, but because of his inability to perform. GTE's evaluations of Watts were accurate, and the decision to terminate

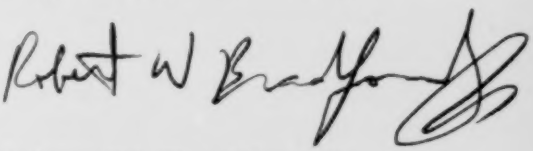
was justified on a business basis, totally unrelated to his race. Indeed, the evidence is that had Watts been white he would have been fired earlier.

Thus, far from being "clearly erroneous", the foregoing review of the evidence clearly supports the Eleventh Circuit's affirmation of the trial court's findings of fact that Watts was discharged because he was not satisfactorily performing his job due to his lack of technical expertise, and his inability to communicate with co-workers.

CONCLUSION

Based on the foregoing discussion of law and fact, it is respectfully submitted that the affirmation of the trial court's findings of fact by the Eleventh Circuit was proper and that the Petition for Writ of Certiorari is due to be denied.

Respectfully submitted,



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June 13, 1987

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-7177
Non-Argument Calendar

BERMAN J. WATTS, JR.,
Plaintiff-Appellant,

versus

GENERAL TELEPHONE COMPANY
OF THE SOUTHEAST,
Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Alabama

(December 16, 1986)

Before RONEY, Chief Judge, HILL and KRAVITCH, Circuit Judges.

PER CURIAM:

Appellant Berman J. Watts brought an action pursuant to Title VII, 42 U.S.C. § 2000(e) et seq., against his former employer, General Telephone Company of the Southeast, seeking injunctive relief, reinstatement and back pay. Watts claimed that his termination by the company was racially motivated and done in retaliation for his having filed discrimination charges

against his company with the [sic] the EEOC. After a bench trial the district court made extensive findings of fact. The court concluded that although Watts proved a prima facie case of retaliation, the company produced ample evidence that its termination of plaintiff was due to unsatisfactory performance on his job: lack of technical expertise, inability to accept cricticism by superiors and to communicate with coworkers, and unsatisfactory evaluations, and that Watts failed to produce any evidence that the reasons advanced by the company were pretextual. The court thus concluded that appellant's discharge was not based upon discrimination but was due to his unsatisfactory performance. Accordingly the court rendered judgment for the company. *See Texas Department of Community Affairs v. Burdine,* 450 U.S. 248.

The determination of discrimination in a Title VII case is an ultimate fact issue and is reviewed by an appellate court under the "clearly erroneous" standard. *Robinson v. City of Fairfield,* 750 F.2d 1507 (11th Cir. 1985); *Baylor v. Jefferson County Board of Education,* 733 F.2d 1527 (11th Cir. 1984). Our review of the record convinces us that the trial court's findings of fact were not clearly erroneous but were amply supported by the evidence. The judgment below is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
SOUTHERN DIVISION

BERMAN J. WATTS, JR.	)	
	)	
Plaintiff	)	
	)	
vs.	)	CIVIL ACTION
	)	NO. 84-H-1216-S
GENERAL TELEPHONE	)	
COMPANY OF THE	)	
SOUTHEAST	)	
	)	
Defendant	)	

JUDGEMENT

In accordance with the attached memorandum opinion, it is ORDERED, ADJUDGED and DECREED that the relief which plaintiff seeks herein is denied.

It is further ORDERED that the court costs incurred in this proceeding be and are hereby taxed against plaintiff, for which execution may issue.

DONE this 9th day of January, 1986.

/s/ Truman Hobbs
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
SOUTHERN DIVISION

BERMAN J. WATTS, JR.	)	
	)	
Plaintiff	)	
	)	
vs.	)	CIVIL ACTION
	)	NO. 84-H-1216-S
GENERAL TELEPHONE COMPANY OF THE SOUTHEAST	)	
	)	
Defendant	)	

MEMORANDUM OPINION

Plaintiff brings this action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e) et seq., seeking injunctive relief, reinstatement and back pay. This Court takes jurisdiction pursuant to 28 U.S.C. §§ 1343(3) and (4).

This cause arises out of defendant's formal appraisals of plaintiff's work performance on April 28, 1981 and November 30, 1981 and defendant's discharge of plaintiff on December 2, 1981. Plaintiff alleges that defendant's acts were racially motivated and done in retaliation for plaintiff having filed racial discrimination charges against defendant with the Equal Employment Opportunity Commission (EEOC). Defendant denies plaintiff's allegations and asserts that plaintiff was discharged for unsatisfactory performance of his job. A nonjury trial was held on December 2, 1985. The Court now sets forth its findings of fact and conclusions of law pursuant to Rule 52, Federal Rules of Civil Procedure. For the reasons herein set

forth, the Court finds that defendant is due a judgment in its favor.

FINDINGS OF FACT

The testimony and exhibits presented at trial disclosed plaintiff's lack of technical expertise, intolerance of criticism by superiors, and inability to communicate with co-workers. The Court thus concludes that defendant discharged plaintiff because he was not performing his job satisfactorily.

In 1972, following a period of academic probation, plaintiff Berman J. Watts graduated from Georgia Institute of Technology with a degree in Aerospace Engineering and a 2.0 grade point average, the minimum required for graduation. Unable to find a position as an aerospace engineer, Mr. Watts accepted a position as a "loss prevention engineer" with Factory Mutual Engineering (FME) in 1973. Mr. Watts was discharged by FME in 1978 due to the company's conclusion that he was not performing satisfactorily. After working in several positions unrelated to his college degree, Mr. Watts submitted an application to defendant General Telephone Company of the Southeast (GTE) in which he omitted his "Reason for Leaving" his job with FME.

GTE hired Mr. Watts in July, 1979, as a "central office equipment (COE) supervisor trainee" and immediately sent him to a 20-week training school. The job of COE supervisor involved trouble shooting and directing technical specialists. In December, 1979, Mr. Watts was assigned to Mr. Leroy Davis, Switching Services Manager of GTE's Alabama division. Based on the testimony, the Court finds that the training given plaintiff and several other COE supervisors was less than optimum for preparation of persons to be COE supervisors.

Mr. Davis testified that most of GTE's COE supervisors begin with GTE as COE technicians and work their way up through the craft ranks so that most have an excellent knowledge of GTE's central office equipment before they become COE supervisors. Mr. Davis further testified that he had personal knowledge of four white male COE supervisors who had been trained in GTE's 20-week training school, as was Mr. Watts, but who had eventually left GTE or had been discharged due to a lack of technical expertise.

Because no "COE supervisor" positions were available when Mr. Watts completed the training program, Mr. Davis assigned him to the Trouble Analysis Center (TAC), which primarily aids COE supervisors in trouble shooting their equipment. In June, 1980, Mr. Watts was formally evaluated by his supervisors in TAC, Mr. Outlaw and Mr. Parker, in accordance with GTE's policy of conducting formal performance appraisals six months after an employee is assigned to a new position, again six months later, and annually thereafter. Mr. Watts received a performance rating of "Below Expectations" from Mr. Parker and Mr. Outlaw, who recommended that Mr. Watts be transferred to another position or terminated. The poor evaluation was based on Mr. Watts' supervisors' conclusions that he lacked "human behavior skills and technical expertise." In response to the poor appraisal, Mr. Watts demanded that his rating be changed to "excellent" and accused his supervisors of having made false statements regarding his performance.

At trial, Mr. Parker testified that while Mr. Watts was under his supervision he received several complaints regarding Watts' attitude and behavior from other GTE employees as well as from representatives of other companies who had communicated with Mr. Watts by telephone. Although Mr. Watts attributed his

poor evaluation by Mr. Parker to racial discrimination, Mr. Parker has recommended six black employees for promotion, and Mr. Watts is the only black employee he has ever recommended for termination.

Rather than terminating Mr. Watts as suggested by his TAC supervisors, GTE decided to place him on probation with 30 day goals to complete. In September, 1980, having accomplished these goals, Mr. Watts was offered a position as a COE supervisor in GTE's Dothan toll center under the supervision of Mr. Wayne Brackin. Three of the primary pieces of equipment in the center are the 91A PCM Carrier, the SATT, and the 104 Director. GTE had sent Mr. Watts to 91A PCM classes while he was assigned to TAC. In addition, Mr. Brackin sent Mr. Watts to approximately six weeks of schooling on the SATT and 104 Director immediately upon his assignment to the toll center. Thereafter, Mr. Watts received on the job training from Mr. Brackin and other COE operators at the toll center. Plaintiff presented no evidence that white COE supervisor trainees who had been trained at GTE's 20-week training school received better or different additional training before becoming COE supervisors.

Upon Watts' completion of his additional training on the SATT and the 104 Director, Mr. Brackin gave Mr. Watts written goals in which he was required to develop a working knowledge of the equipment under his supervision by February 27, 1981. Plaintiff charges that Mr. Brackin evidenced racial discrimination in assigning him such goals which had never been given to any other COE supervisor. But such goals had never been given to other COE supervisors, white or black, by Mr. Brackin because all other COE supervisors who had been assigned to him had already acquired a working knowledge of the equipment prior to becoming COE supervisors. The Court finds such goals as-

signed to plaintiff are reasonable and do not indicate any racial discrimination.

On April 28, 1981, Mr. Brackin completed his first formal appraisal of Mr. Watts' job performance in which he rated Mr. Watts as "provisional," or just above "unsatisfactory." While Mr. Brackin's appraisal included his opinion that Mr. Watts had a "highly defensive" attitude, "poor judgment," and only "marginally acceptable" technical skills, Mr. Brackin also noted that "with continued emphasis and initiative on his part, I expect his performance to progress to an acceptable level." In addition, Mr. Brackin listed the following incidents involving Mr. Watts which influenced his opinion of Mr. Watts' performance:

1. a disagreement between Mr. Watts and co-employees while attending training classes in Texas;

2. an argument between Mr. Watts and another supervisor;

3. reluctance of Mr. Watts to work with Mr. Brackin on developing goals;

4. Mr. Watts' failure to follow direct instructions from Mr. Brackin concerning problems in GTE's Midland City office; and

5. Mr. Watts' failure to follow GTE's policy of keeping the Dothan Toll Testboard manned twenty-four hours a day.

Mr. Watts responded to Mr. Brackin's evaluation by submitting an "Analysis" of the appraisal to GTE in which he accused Mr. Brackin of racial discrimination and "demonstrable breaches of business, moral and legal ethics."

In May, 1981, Mr. Brackin gave Mr. Watts revised written goals. Mr. Brackin reviewed these goals with Mr. Watts on June 1, 1981, but Mr. Watts refused to concur in them. The revised goals included a modified

version of Watts' former developmental goals as well as the following:

> 7. Improve oral communications with craft employees to the point where oral and written grievances do not exceed those of other supervisors in the same work group.
>
> 8. Develop a harmonious rapport with associated departments. Measurement of this objective will be from reports of positive or negative responses to myself or superiors.

Mr. Brackin testified that he had previously given three white COE supervisors "minor goals" which required them to develop better communication skills, but there was no evidence that these men's communication problems were as severe as those of Watts. Mr. Brackin further testified that no other black COE supervisor assigned to him had been given goals concerning development of communication or interpersonal skills because no other had needed such goals.

On September 23, 1981, plaintiff filed a racial discrimination charge against GTE with the EEOC complaining that Mr. Brackin had treated him adversely in retaliation for plaintiff's having filed a former EEOC charge in December, 1980, which had been conciliated.

On November 30, 1981, Mr. Brackin completed his second formal appraisal of Mr. Watts' work performance in which he recommended termination due to Watts' "continued unacceptable performance" resulting from "his lack of ability to communicate effectively with and direct the activities of his work group, his use of poor judgment and total inability to get along with his fellow employees." Mr. Brackin testified that he gave Mr. Watts an "unsatisfactory" rating on his goal of improving oral communications because, during the rating period, Mr. Watts had six union grievances filed against him as opposed to only one grievance having

been filed against the other two COE supervisors in his work group. Although Mr. Watts proposed that the excessive grievances filed against him were motivated by racial animus, the evidence showed that no grievances were filed against Mr. Willie Durr, another black COE supervisor, during the entire period Mr. Watts served as a COE supervisor, and that Mr. W. A. Brown, another black COE supervisor, was commended on a formal performance appraisal by Mr. Brackin for improving relations with craft employees.

On the November, 1981, evaluation Mr. Brackin listed the following incidents which influenced his recommendation that Mr. Watts be terminated:

1. Mr. Watts' repeated failure to identify himself when making or receiving business calls;
2. Mr. Watt's failure to follow a direct instruction from Mr. Brackin concerning replacement of an absent employee;
3. Mr. Watts' failure to keep an appointment to provide a building tour to a new employee;
4. Mr. Watts' failure to perform a job assigned to him by Mr. Brackin;
5. an argument between Mr. Watts and Mr. Brackin, initiated by Mr. Watts;
6. an unnecessary call from Mr. Watts to Mr. Brackin's home at 12:55 A.M., during which Mr. Watts hung up on Mr. Brackin;
7. Mr. Watts' inability to correct a problem with the SATT equipment;
8. Mr. Watts' failure to follow Mr. Brackin's advice on answering a union grievance;
9. complaints to Mr. Brackin by Mr. Watts' coworkers concerning Watts' attitude and behavior;
10. Mr. Watts' failure to consider all relevant factors in evaluating a subordinate and recommending him for a management position;

11. complaints from co-employees to the Personnel Manager and to Mr. Davis about Mr. Watts' behavior at a grievance meeting; and
12. poor judgment on Mr. Watts' part in his attempt to solve an equipment breakdown.

GTE discharged Mr. Watts on December 2, 1981. Mr. Watts filed a third charge with the EEOC on December 14, 1981, alleging that GTE discharged him because of his race and in retaliation for his having filed previous EEOC charges. On March 31, 1983, the EEOC issued a determination of "reasonable cause" to believe the allegations in plaintiff's September, 1981 and December, 1981 charges. On June 21, 1984, the EEOC directed to plaintiff a "right to sue" letter. Plaintiff timely commenced this action on September 18, 1984.

At trial, GTE presented testimony by Mr. Watts' supervisors concerning his lack of technical skill and his inability to communicate with co-employees. Defendant also produced evidence of written and oral complaints received by Mr. Brackin which reflected these shortcomings. In addition, GTE's staffing and development manager testified that the utilization of black employees in GTE's Alabama division met or exceeded affirmative action guidelines based on OFCCP regulations during the period from 1979 to 1983. In contrast, plaintiff did not call a single witness to support his claim of discrimination, nor did he produce any statistical evidence of racial discrimination by GTE. No witness, other than plaintiff himself, testified that Mr. Watts' performed satisfactorily while employed with GTE.

CONCLUSION OF LAW

Plaintiff proved a prima facie case of retaliation through evidence that he engaged in activity protected under 42 U.S.C. § 2000(e)(3)(a), that he was treated adversely by his employer, and that the adverse treatment followed closely enough upon the protected activity to establish a causal link between them. *Eastland v. Tennessee Valley Authority,* 704 F.2d 613 (11th Cir.), *reh'g denied,* 714 F.2d 1066 (11th Cir.), *cert. denied,* 104 S.Ct. 1415 (1983). However, defendant produced convincing evidence that its poor evaluations and subsequent termination of plaintiff resulted from plaintiff's technical ineptitude and plantiff's difficulty in communicating and getting along with other employees. Since plaintiff failed to prove that the reasons defendent gave for its actions were pretextual or that racial animus was the true motive behind defendant's adverse treatment of plaintiff, this Court is compelled to deny plaintiff the relief he seeks. *See Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981); *Hamm v. Members of the Board of Regents of the State of Florida,* 708 F.2d 647 (11th Cir.), *reh'g denied,* 715 F.2d 580 (11th Cir. 1983).

The Court has not decided whether plaintiff proved a prima facie case under a disparate treatment theory since the outcome of this cause would not be altered by such a finding. *See Burdine,* 450 U.S. 248

A separate judgment will be entered in accordance with this memorandum opinion.

DONE this 9th day of January, 1986.

/s/ Truman Hobbs

United States District Judge